Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 28 October 2021 [1]

Case C-275/20

European Commission
v

Council of the European Union

(Action for annulment – Decision (EU) 2020/470 – Extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part – Procedural legal basis – Article 218(7) TFEU – Applicable procedure and voting rule)

I. Introduction

1. By its application, the European Commission seeks the annulment of Council Decision (EU) 2020/470 of 25 March 2020 as regards the extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part. [2]

2. That Protocol established a framework within which the Parties cooperate for facilitating exchanges regarding cultural activities, goods and services, including inter alia in the audiovisual sector, and for improving the conditions governing such exchanges. In the Protocol, the Parties agreed to grant audiovisual co-productions between producers from the European Union and from the Republic of Korea entitlement to benefit from their respective schemes for the promotion of local/regional cultural content. That entitlement is subject to renewal every three years.

3. At EU level, the Commission was authorised by the Council of the European Union to terminate the entitlement at issue before the expiry of each period or to propose its renewal. The present case will lead the Court to clarify whether that authorisation falls within the scope of Article 218(7) TFEU and, if so, whether the conditions governing its exercise are consistent with that provision.

1 Original language: French.

2 OJ 2020 L 101, p. 1, 'the contested decision'.

II. Legal framework

A. Protocol on Cultural Cooperation

4. The Protocol on Cultural Cooperation,[3] which is annexed to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part,[4] provides, in Article 5, headed 'Audiovisual co-productions', for the entitlement for audiovisual co-productions to benefit from the respective schemes for the promotion of local/regional cultural content ('the entitlement at issue'). It is worded as follows:

'…

3. The Parties, in conformity with their respective legislation, shall facilitate co-productions between producers from the EU Party and Korea, including through entitlement for co-productions to benefit from respective schemes for the promotion of local/regional cultural content.

…

8. (a) The entitlement for co-productions to benefit from the respective schemes for the promotion of local/regional cultural content referred to in paragraphs 4 and 5 is established for a period of three years following the application of this Protocol. Upon advice from the Domestic Advisory Groups, six months before the expiry, the Committee on Cultural Cooperation will coordinate in order to assess the results of the implementation of the entitlement in terms of enhancement of cultural diversity and mutually beneficial cooperation on co-produced works.

(b) The entitlement will be renewed for a duration of three years and shall thereafter be automatically renewed for further successive periods of the same duration, unless a Party terminates the entitlement by giving notice in writing at least three months before the expiry of the initial or any subsequent period. Six months before the expiry of each renewed period, the Committee on Cultural Cooperation will conduct an assessment on similar terms as described in subparagraph (a).

…'

[3] OJ 2011 L 127, p. 1418.

[4] OJ 2011 L 127, p. 6, 'the Agreement with the Republic of Korea'.

B. Decision 2011/265/EU

5. Recital 6 of Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part,[5] states:

'(6) Pursuant to Article 218(7) of the Treaty, it is appropriate for the Council to authorise the Commission to approve certain limited modifications to the Agreement [with the Republic of Korea]. The Commission should be authorised to bring about the termination of the entitlement to co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation unless the Commission determines that the entitlement should be continued and this is approved by the Council pursuant to a specific procedure necessitated both by the sensitive nature of this element of the Agreement and by the fact that the Agreement is to be concluded by the Union and its Member States. …'

6. Article 4(1) of that decision provides:

'The Commission shall provide notice to Korea of the Union's intention not to extend the period of entitlement to co-production pursuant to Article 5 of the Protocol on Cultural Cooperation following the procedure set out in Article 5(8) thereof unless, on a proposal from the Commission, the Council agrees four months before the end of such period of entitlement to continue the entitlement. If the Council agrees to continue the entitlement this provision shall again become applicable at the end of the renewed period of entitlement. For the specific purposes of deciding on the continuation of the period of entitlement, the Council shall act by unanimity.'

C. Implementing Decision 2014/226/EU

7. By Council Implementing Decision 2014/226/EU of 14 April 2014 as regards the extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part,[6] the period of entitlement for audiovisual co-productions to benefit from the respective schemes of the Parties for the promotion of local and regional cultural content as provided for in paragraphs 4 to 7 of Article 5 of the Protocol was extended for a duration of three years, from 1 July 2014 to 30 June 2017.

D. Decision (EU) 2015/2169

8. By Council Decision (EU) 2015/2169 of 1 October 2015 on the conclusion of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part,[7] that agreement was approved on behalf of the Union. Recital 6 of that decision has the same wording as recital 6 of Decision 2011/265. Similarly, Article 3(1) of Decision 2015/2169 is similar in content to Article 4(1) of Decision 2011/265.

5 OJ 2011 L 127, p. 1.

6 OJ 2014 L 124, p. 25.

7 OJ 2015 L 307, p. 2.

E. Decision (EU) 2017/1107

9. By Council Decision (EU) 2017/1107 of 8 June 2017 as regards the extension of the period of entitlement to audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part,[8] the period of entitlement for audiovisual co-productions to benefit from the respective schemes of the Parties for the promotion of local and regional cultural content, as provided for in paragraphs 4 to 7 of Article 5 of the Protocol, was extended for a duration of three years, from 1 July 2017 to 30 June 2020.

F. The contested decision

10. The contested decision, which was adopted on the basis of Article 3(1) of Decision 2015/2169, provides that the period of entitlement for audiovisual co-productions to benefit from the respective schemes of the Parties for the promotion of local/regional cultural content, as provided for in paragraphs 4 to 7 of Article 5 of the Protocol on Cultural Cooperation, is extended for a duration of three years, from 1 July 2020 to 30 June 2023.

III. Forms of order sought

11. The Commission claims that the Court should annul the contested decision and order the Council to pay the costs.

12. The Council contends that the Court should dismiss the action and order the Commission to pay the costs. In the alternative, should the contested decision be annulled, it requests the Court to maintain its effects until the grounds for annulment have been remedied.

13. By decisions of the President of the Court of 7 December 2020, the French Republic and the Kingdom of the Netherlands were granted leave to intervene in support of the form of order sought by the Council.

IV. Summary of the pleas in law and arguments of the parties

14. In support of its action for annulment, the Commission raises a single plea in law alleging that the use of Article 3(1) of Decision 2015/2169 as a legal basis for the contested decision is contrary to the Treaty and the Court's case-law and is therefore unlawful.

15. It argues that this provision of Decision 2015/2169 was included in the Proposal for a Council Decision concluding the Free Trade Agreement between the European Union and its Member States and the Republic of Korea, which it presented on 9 April 2010,[9] but that, in the light of developments in the Court's case-law since the entry into force of the Treaty of Lisbon, it appears that the proposal that it was obliged to present in order to obtain the approval of the Council with a view to concluding that agreement is not consistent with the Treaties, which is why it has systematically declined to act on the basis of that provision since 2015. Despite its express opposition, the same provision, which requires unanimity without participation by the European

[8] OJ 2017 L 160, p. 33.

[9] COM(2010) 137 final.

Parliament, was applied by the Council in adopting both Decision 2017/1107 and the contested decision, for which its proposal for a decision was based on Article 167(3) in conjunction with Article 218(6)(a)(v) TFEU, which, read in conjunction with the first subparagraph of Article 218(8) TFEU, provides for a vote by a qualified majority of the Council, after obtaining the consent of the Parliament.

16. The Commission asserts that these latter provisions were applicable because the contested decision concerns the extension of the period of application of part of an international agreement. Article 3(1) of Decision 2015/2169 constitutes a secondary legal basis, the use of which is contrary to the principle of conferral of powers set out in Article 13(2) TEU and the principle of institutional balance and thus to the Treaty as interpreted by the Court. [10]

17. In addition, recourse to a secondary legal basis requiring unanimity within the Council is unlawful in the light of the Court's case-law. [11] It is inconsistent, moreover, to require unanimity in the Council for the renewal of the entitlement at issue when the establishment of that entitlement was decided by a qualified majority and the European Union has accepted under international law that it be renewed automatically in principle. The application of a more stringent internal rule and the requirement that the Council must accept the renewal of that entitlement runs counter to the objective of automatic renewal agreed by the Parties to the Protocol on Cultural Cooperation and is therefore contrary to the case-law concerning the primacy of international agreements over EU secondary legislation. [12]

18. The Council, supported by the French Republic and the Kingdom of the Netherlands, considers that, in adopting the contested decision, it acted within the limits of its competences, in accordance with the procedure laid down in the Treaties, and complied with the principle of institutional balance.

19. It notes that the Commission presented a Proposal for a Council Decision authorising the signature and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [13] which includes the Protocol on Cultural Cooperation, and a Proposal for a Council Decision concluding that Agreement. [14] In those two proposals, the Commission presented the applicable procedure for the EU's internal decision-making process for the purposes of the extension or the withdrawal of the entitlement at issue at the end of each period of three years, that procedure was then adopted in the context of Decision 2015/2169. The Commission also provided explanations on the legal basis for that procedure, namely Article 218(7) TFEU, in recital 6 of each of the two proposals, which were adopted by the Council without amendment. The Parliament consented to the Council decision on the conclusion of the agreement by a legislative resolution of 17 February 2011. [15]

[10] It refers in this regard to the judgment of 6 May 2008, *Parliament* v *Council* (C-133/06, EU:C:2008:257, paragraphs 54 to 60 and the case-law cited).

[11] The Commission refers in this regard to the judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:662, paragraph 27 and the case-law cited).

[12] The Commission refers in this regard to the judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 42).

[13] COM(2010) 136 final.

[14] See footnote 9 of this Opinion.

[15] OJ 2012 C 188 E, p. 113.

20. The Council points out that the Commission, which does not explain why it had 'felt obliged' to make a proposal to which it was opposed, never presented to the Council a proposal to modify the procedure laid down in Article 3(1) of Decision 2015/2169 and, when the most recent extension period was due to expire on 30 June 2020, failed to present a proposal for a further extension of the entitlement at issue. After requesting the Commission to give notice of the withdrawal of the entitlement to the Republic of Korea or to present a proposal for a decision to the Council for its extension for a further period of three years, the Council adopted the contested decision on the basis of a proposal from the Commission.

21. The Council asserts, first, that it did not rely on a secondary legal basis in adopting the contested decision, that the procedure applied by it is based on Article 218(7) TFEU and that this procedure is compatible with that provision. The explicit reference to Article 218(7) TFEU in recital 6 of Decision 2015/2169 makes it very clear that Article 3(1) of the decision is based on that provision, which permits the Council to derogate from Article 218(5), (6) and (9) TFEU where the agreement concluded by the Union provides for a simplified modification procedure, like the one provided for in Article 5(8) of the Protocol on Cultural Cooperation. That reference to Article 218(7) TFEU also explains the procedure laid down in Article 3(1) of Decision 2015/2169 for the purposes of the application of that provision of the Protocol.

22. The conditions governing the applicability of Article 218(7) TFEU are met because the extension of the entitlements constitutes a modification of a specific, independent part of the Agreement with the Republic of Korea by means of a simplified procedure, the Commission being authorised in particular, in its capacity as negotiator, to modify the entitlement at issue by withdrawing it on the expiry of the current period of three years and to give notice of that decision to the Republic of Korea. That procedure thus implements the simplified modification procedure laid down in Article 5(8) of the Protocol on Cultural Cooperation. In addition, the procedure provided for in Article 3(1) of Decision 2015/2169 attaches valid conditions to the authorisation granted to the Commission in that context. Thus, it is provided that if the Commission determines that the entitlement at issue should be extended for a further period of three years, it must submit that decision to the Council for approval. Consequently, that procedure, which forms the legal basis for the contested decision, was established in accordance with the authorisation provided for by the Treaties and the legal basis of that decision is not a secondary legal basis.

23. Second, the Council asserts that the Commission contradicts itself with regard to the procedure which it considers to be applicable, maintaining that the consent of the Parliament is required under Article 218(5) and (6) TFEU, whilst claiming that no internal procedure should be applied given that Article 5(8) of the Protocol on Cultural Cooperation provides for the automatic renewal of the entitlement at issue every three years and that provision of international law has primacy over internal secondary legislation. There is no conflict between Article 5(8) of the Protocol and Article 3(1) of Decision 2015/2169 as the former establishes the procedure to be followed between the Parties to the Agreement with the Republic of Korea, while the latter establishes the decision-making procedure within the Union for the purposes of the application of Article 5(8) of the Protocol.

24. Third, the Council considers that the Commission's argument concerning failure to comply with the principle of institutional balance and the principle of conferral of powers is not justified. The Commission never intended to ensure that consent was requested from the Parliament, as it presented its Proposal for a Council Decision less than a month before the expiry of the period for

giving notice of the non-renewal of the entitlement at issue to the Republic of Korea, when it was no longer feasible to reach an agreement within the Council and to request the consent of the Parliament.

25. Fourth, the Council takes the view that the Commission errs in contesting the requirement of unanimity within the Council, when it proposed that voting rule itself and it has never proposed amending Article 3(1) of Decision 2015/2169. The extension of the entitlement at issue constitutes a derogation from the general rule that the entitlement is withdrawn in the absence of a decision to the contrary, which justifies more stringent conditions.

26. In the alternative, the Council submits that if the Court were to find that it was not possible to stipulate unanimity among the conditions referred to in Article 218(7) TFEU, it would only be the obligation to act by unanimity that was not valid. However, because the contested decision was adopted by unanimity, it should, in the Council's view, be considered to have been adopted legitimately and should not be annulled. Lastly, in the event that the Court were to annul the contested decision, the Council considers that its effects should be maintained.

27. In its reply, the Commission contends, principally, that it shares the Council's view that the purpose of the contested decision is a modification to an agreement within the meaning of Article 218(7) TFEU in so far as it extends the period of application of the provision contained in the Protocol on Cultural Cooperation. However, by providing for the automatic renewal of the entitlement at issue for further successive periods of the same duration, the Protocol does not establish a simplified procedure for the renewal of that entitlement, with the result that it is not necessary for the Council to authorise the Commission to approve the renewal of the entitlement. Article 3(1) of Decision 2015/2169 cannot therefore be regarded as a case where Article 218(7) TFEU is applicable. By contrast, the Protocol establishes a procedure for terminating the entitlement at issue. To that end, the Council may authorise the Commission to decide to give notice to the other Party to the Agreement with the Republic of Korea and that authorisation may be granted in advance in the decision concerning the conclusion of that agreement, subject to appropriate conditions.

28. The Commission adds that, contrary to the assertion made by the Council, the procedural conditions attached to the authorisation purportedly granted to the Commission are incompatible with Article 218 TFEU, as the Court has ruled that, for situations where Article 218(9) TFEU applies, recourse to a secondary legal basis requiring unanimity within the Council is unlawful.[16] This is even more evident in cases in which Article 218(7) TFEU applies.

29. In addition, Article 3(1) of Decision 2015/2169 does not authorise the Commission to approve on the Union's behalf modifications to the Agreement with the Republic of Korea within the meaning of Article 218(7) TFEU, but simply reflects the Commission's power, in the case of a decision opposing the renewal of the entitlement at issue, to ensure the Union's external representation in accordance with Article 17 TEU. Article 3(1) of Decision 2015/2169 confirms that the power to determine that renewal has remained with the Council and that there has been no effective transfer of decision-making power to the Commission. Consequently, Article 218(7) TFEU does not constitute a legal basis permitting the Council to make the renewal of the entitlement at issue subject to the specific conditions laid down in Article 3(1) of Decision 2015/2169.

[16] The Commission refers in this regard to the judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:662, paragraph 27 and the case-law cited).

30. Lastly, the Commission opposes the claims made by the Council in the alternative.

31. In its rejoinder, the Council, first, contests the Commission's argument that the entitlement at issue can be extended by the Union without recourse to an internal procedure if the Commission intends to renew it, whereas a decision-making procedure is necessary to terminate it. In the view of the Council, the Union must apply the relevant internal decision-making procedure for modifying the Protocol on Cultural Cooperation, whether to extend or to terminate the entitlement at issue. The automatic character of the extension vis-à-vis each of the Parties to the Agreement with the Republic of Korea cannot preclude any kind of internal decision-making procedure since, under Article 5(8) of the Protocol, the duration of the entitlement at issue is limited to three years and that entitlement may be renewed for successive periods whose duration is also limited to three years, which implies that a decision is taken every three years using the appropriate internal decision-making procedures. The Commission's interpretation prejudices not only the autonomy of the EU legal order but also the institutional balance, given that the Commission could decide to exclude the Council from the decision-making process relating to the extension.

32. Second, the Council maintains that Article 218(7) TFEU constitutes the appropriate legal basis for the procedure laid down in Article 3(1) of Decision 2015/2169. Contrary to the claim made by the Commission, Article 5(8) of the Protocol on Cultural Cooperation establishes a simplified procedure for extending the entitlement at issue in so far as the agreement of the Parties is given tacitly. In addition, that article requires the Party that wishes to terminate the entitlement to give prior notice. The procedure is therefore two-fold and prescribes two procedural steps as part of a simplified procedure for modifying the Protocol.

33. Third, the Council submits that the procedure laid down in Article 3(1) of Decision 2015/2169 is appropriate. It prescribes internally the Union's default position on the modification of the Protocol on Cultural Cooperation for successive periods of three years until the entitlement at issue is terminated. By default, the entitlement ends on the expiry of the period of three years for which it was established and the Commission must satisfy the requirement laid down in Article 5(8)(b) of the Protocol. However, the Commission is entitled to take the view that the renewal of the entitlement is appropriate and, in that case, depart from the default position, seeking the approval of the Council, acting by unanimity, so as not to give notice of the withdrawal of the entitlement.

34. The Council contests the claim that the unanimity voting rule invalidates the procedure in its entirety and, for that reason, Article 3(1) of Decision 2015/2169 constitutes a secondary legal basis. That claim does not take account of the fact that the Council approved the position of the Union, as required by the procedure laid down in Article 5(8) of the Protocol, namely that the entitlement at issue be terminated on the expiry of the current period, and that the extension of the entitlement, in derogation from this position adopted by a qualified majority, requires a stricter voting rule.

35. The French Republic concurs with all the submissions made by the Council. Like the Council, it points out that the legal basis for the contested decision defines a decision-making procedure founded on Article 218(7) TFEU and that the decision implements that procedure.

36. It asserts, first, that the detailed rules for extending the entitlement at issue certainly constitute a case where Article 218(7) TFEU is applicable. In the first place, as the Commission acknowledges, the renewal of that entitlement does constitute a modification to the Protocol on

Cultural Cooperation within the meaning of that provision. To take the view that the extension of the entitlement does not constitute such modification on the ground that it is automatic would render ineffective the provision of the Protocol under which the entitlement is valid for a limited duration in the absence of tacit agreement between the Parties.

37. In the second place, contrary to the assertion made by the Commission, the automatic renewal of the entitlement at issue is part of a procedure framed by the Protocol on Cultural Cooperation, which involves an assessment carried out by the Committee on Cultural Cooperation. The interpretation of the notion of 'simplified procedure' within the meaning of Article 218(7) TFEU in the light of the principles of international law, in particular the Vienna Convention on the Law of Treaties of 23 May 1969,[17] confirms that that notion is applicable in the present case. By way of derogation from paragraphs 5, 6 and 9 of that article, paragraph 7 applies where an international agreement lays down derogating provisions for its modification, provided they are aimed at simplifying the revision procedure. Automatic renewal of the entitlement at issue, where the Parties are silent, should be considered to fall within this category of stipulations derogating from the revision procedure under the general law governing international agreements, in comparison with which it clearly brings about simplification.

38. Second, the French Republic asserts that the mechanism laid down in Article 3(1) of Decision 2015/2169 correctly implements Article 218(7) TFEU in so far as it provides that the Council must approve the Commission's decision not to give notice of the termination of the entitlement at issue. That decision authorises the Commission to provide notice to the Republic of Korea of the Union's intention not to extend the entitlement, without the approval of the Council. However, if the Commission determines that the entitlement should be continued, it must obtain authorisation from the Council. Specific conditions within the meaning of Article 218(7) TFEU are thus attached to the authorisation for the Commission, which are legitimate, as that provision constitutes a derogation from paragraph 5, 6 and 9 of that article. Those conditions should be considered in the light of the institutional balance established by the Treaty and, in particular, the third subparagraph of Article 16(6) TEU. The decision to accept the extension of the period of validity of the entitlement at issue should be regarded as one of the measures by which the Union's policy is made and its external action is elaborated. The Council may therefore provide, among the specific conditions, that the decision which may be taken by the Commission on the basis of Article 3(1) of Decision 2015/2169 must be preceded by an agreement to that effect with the Council such that the Council is placed in a position to determine that the entitlement at issue is still in the interest of the Union. Recourse to unanimity is merely a means of exercising that approval from the Council, the lawfulness or unlawfulness of which has no bearing on the validity of the requirement for such approval.

39. Third and lastly, the French Republic considers that in any event, from the point of view of EU law, the entitlement at issue could not be legitimately renewed solely pursuant to the tacit renewal procedure laid down in the Protocol on Cultural Cooperation in the absence of an EU act specifically authorising this. In accordance with the principle of the autonomy of the EU legal order, it is not for an international agreement to determine the internal procedures of the Union.

40. The Kingdom of the Netherlands concurs fully with the Council's position and all the arguments relied on in support of that position.

[17] *United Nations Treaty Series*, vol. 1155, p. 331.

V. Analysis

A. The single plea in law raised by the Commission

41. For modifications to an international agreement concluded by the Union pursuant to the ordinary procedure provided for in Article 218(6) TFEU, the general rule is a parallelism of forms, which means that in principle that same ordinary procedure must be implemented for such modification.

42. By way of exception, Article 218(7) TFEU provides for a simplified procedure [18] for the modification of an agreement concluded by the Union, which is intended to replace the ordinary procedure for the conclusion of such an agreement.

43. Under Article 218(7) TFEU, 'when concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation'.

44. By its single plea in law, the Commission submits that the contested decision was incorrectly adopted on the basis of Article 3(1) of Decision 2015/2169, which constitutes a secondary legal basis for which no provision is made in the FEU Treaty. The Council has thus infringed the principle of conferral of powers set out in Article 13(2) TEU and the principle of institutional balance developed by the Court in its case-law. [19]

45. The purpose of Article 3(1) of Decision 2015/2169 is to clarify the procedure and conditions governing the authorisation conferred on the Commission.

46. Recital 6 of Decision 2015/2169 states that this authorisation is based on Article 218(7) TFEU, under which the Council may authorise the Commission to approve certain modifications to an agreement. The object of the authorisation is specified in recital 6 and in Article 3(1) of that decision. It is to authorise the Commission to bring about, on behalf of the Union, the termination of the entitlement to co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation and to provide notice of this to the Republic of Korea. The Commission is thus authorised to inform that State of the Union's intention not to extend the period of entitlement following the procedure set out in Article 5(8) of the Protocol.

[18] See Opinion of Advocate General Szpunar in *Germany* v *Council* (C-600/14, EU:C:2017:296, point 57). The simplified character of the procedure is apparent inter alia from the fact that Article 218(7) TFEU does not provide for any involvement by the Parliament. See, in this regard, Rapoport, C., 'La procédure de conclusion des accords externes de l'Union européenne: quelle unité après Lisbonne?', *The European Union in the World – Essays in Honour of Marc Maresceau*, Brill-Nijhoff, Leyde, 2014, p. 149 to 169. The author observes that 'the democratisation process still shows room for improvement in that it applies only at the stage when an agreement is drawn up and does not continue once the agreement is in force. Whether it be the modification of an agreement using a simplified procedure, the suspension of the agreement or the adoption of legislation derived from the agreement, the Parliament … will benefit only from the right to information guaranteed by [Article 218,] paragraph 10 [TFEU]. In these three areas, the Parliament depends on full compliance with the Framework Agreement [on relations between the European Parliament and the European Commission (OJ 2010 L 304, p. 47)] by the Commission or on a purely discretionary decision by the Council to refer the matter to it' (p. 158). It should be noted that the Commission has undertaken to keep the Parliament fully informed before approving modifications to an agreement on the basis of the authorisation which it has received from the Council pursuant to Article 218(7) TFEU; see Annex III, point 9 to the Framework Agreement on relations between the European Parliament and the European Commission.

[19] See, inter alia, judgment of 6 May 2008, *Parliament* v *Council* (C-133/06, EU:C:2008:257, paragraphs 56 to 61).

47. I would point out in this regard that Article 5(8)(b) of the Protocol lays down the rule that after the initial period of three years the entitlement for co-productions will be renewed for a duration of three years and *is thereafter automatically renewed* for further successive periods of the same duration, *unless a Party terminates the entitlement* by giving notice in writing at least three months before the expiry of the initial or any subsequent period.

48. From the point of view of the European Union, the Commission is therefore the institution authorised to terminate, on behalf of the Union, the entitlement for co-productions, which is otherwise subject to automatic renewal.

49. However, specific conditions are attached to that authorisation conferred on the Commission, as provided for in Article 218(7) TFEU.

50. As is clear from recital 6 of Decision 2015/2169, the Commission is authorised to bring about the termination of the entitlement at issue unless it 'determines that the entitlement should be continued and this is approved by the Council pursuant to a specific procedure' or, to put it another way in the words of Article 3(1) of that decision, 'unless, on a proposal from the Commission, the Council agrees four months before the end of such period of entitlement to continue the entitlement'. In the latter case, that provision stipulates that the Council is to act by unanimity. The application of this 'specific procedure' is justified, according to recital 6 of Decision 2015/2169, by the 'sensitive nature of this element of the Agreement [with the Republic of Korea] and by the fact that [this] Agreement is to be concluded by the Union and its Member States'.

51. In short, the procedure for authorising the Commission as set out in Article 3(1) of Decision 2015/2169 is intended to permit the Union to terminate the entitlement at issue at the end of each period of three years in accordance with the option available to each Party to do so under Article 5(8)(b) of the Protocol on Cultural Cooperation. It is thus evaluated whether or not it is appropriate to withdraw or renew the entitlement at issue every three years in a procedure conducted by the Commission. It is only if the Commission considers that the entitlement at issue should be renewed that a Council decision to that effect must be adopted by unanimity.

52. The contested decision is specifically the expression of the Council's wish to accept the extension of the period of entitlement for a duration of three years, from 1 July 2020 to 30 June 2023.

53. It is clear from the wording of the contested decision that it is based on Article 3(1) of Decision 2015/2169.

54. Consequently, the plea in law relied on by the Commission in support of its action can be upheld only if the unlawfulness of that provision is established. That would be the case if it were found that the procedure which it introduces for the adoption of measures like the contested decision falls outside the scope of what is authorised by Article 218(7) TFEU.

55. In that regard, according to the Court's case-law, 'as the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties. Accordingly, to acknowledge that an institution can establish secondary legal bases for the adoption of legislative acts or implementing measures, whether for the purpose of

strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaties'. [20]

56. It must therefore be ascertained whether the procedure laid down in Article 3(1) of Decision 2015/2169 is consistent with Article 218(7) TFEU, which it seeks to implement.

57. To that end, it is necessary to examine whether the conditions governing the application of Article 218(7) TFEU are met. This entails determining, first, whether Article 3(1) of Decision 2015/2169 contains an authorisation for the Commission to approve on the Union's behalf a modification to the Agreement with the Republic of Korea, second, whether the agreement provides that such modification must be adopted by a simplified procedure or by a body set up by that agreement and, lastly, whether the rules laid down in that provision constitute 'specific conditions' within the meaning of Article 218(7) TFEU.

58. With regard, first, to the question whether Article 3(1) of Decision 2015/2169 contains an authorisation for the Commission to approve on the Union's behalf a modification to the Agreement with the Republic of Korea, I note that the parties concur on this point. The Commission does not offer any explanation in this regard. The Council considers that the extension of the entitlement at issue constitutes a modification of a specific and independent part of that agreement and observes in particular that the Commission, in its capacity as negotiator, is authorised to modify that entitlement by withdrawing it on the expiry of the period of three years. The French Republic asserts that renewal extends the period of application of the stipulations of the agreement concerning the entitlement for co-productions and therefore constitutes a modification to that agreement.

59. I must confess that I have doubts whether it is possible to describe the renewal of the entitlement at issue as a 'modification to the agreement' in so far as the Protocol on Cultural Cooperation itself establishes the principle of a tacit, automatic renewal of that entitlement unless one of the Parties objects. The contested decision is not designed to modify that Protocol in this regard but, on the contrary, is intended to reiterate at EU level the Union's wish to continue the entitlement at issue.

60. On the other hand, I acknowledge that, in so far as the authorisation for the Commission contained in Article 3(1) of Decision 2015/2169 aims to terminate, on behalf of the Union, the entitlement at issue, the implementation by the Commission of such authorisation would effectively render Article 5(8) of the Protocol on Cultural Cooperation and the provisions of the Protocol establishing that entitlement redundant, the legal effect of which would be equivalent to the deletion of those provisions. As is required by the wording of Article 218(7) TFEU, which provides that '*when concluding an agreement*, the Council may … authorise the negotiator to approve on the Union's behalf modifications to the agreement', [21] it is therefore on an analysis of the scope of the authorisation contained in Article 3(1) of Decision 2015/2169 that the purpose of such authorisation should be considered to be a modification to the Agreement with the Republic of Korea. In this instance, that is the case in so far as the authorisation seeks to amend the normative content of the Protocol on Cultural Cooperation by potentially depriving of legal effect the entitlement for co-productions and the rule that the entitlement is automatically renewed in principle every three years.

[20] See, inter alia, judgment of 22 September 2016, *Parliament* v *Council* (C-14/15 and C-116/15, EU:C:2016:715, paragraph 47 and the case-law cited).

[21] My italics.

61. At this stage of my remarks, I find it interesting to draw a parallel with the delegated acts governed by Article 290 TFEU, although I am not claiming that the authorisation provided for in Article 218(7) TFEU should be fully comparable to delegation within the meaning of Article 290 TFEU. I would point out that the possibility of delegating powers under that article aims to enable the EU legislature to focus on the essential elements of a piece of legislation and on the non-essential elements in respect of which it deems it appropriate to legislate, while entrusting the Commission with the task of supplementing certain non-essential elements of the legislative act adopted or amending such elements in the context of a delegation conferred on it. [22]

62. As with the use of delegated acts, the authorisation for the Commission under Article 218(7) TFEU meets objectives of efficiency and speed, the idea being to speed up the EU decision-making process. [23]

63. It may be appropriate in this regard, while taking into account the particular characteristics of an authorisation for the Commission to approve modifications to an international agreement, to draw inspiration from the conception adopted by the Court of the notion of 'modification' in Article 290(1) TFEU.

64. According to the case-law of the Court, it is clear from Article 290(1) TFEU that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general scope which supplement or amend certain non-essential elements of the legislative act. [24] Article 290(1) TFEU provides for two categories of delegated powers, namely the powers to supplement and to amend the legislative act. [25] The delegation of a power to amend a legislative act aims to authorise the Commission to *modify* or *repeal* non-essential elements laid down by the EU legislature in that act. [26] The existence of a modification is established where power is conferred on the Commission to amend the normative content of a legislative act, [27] which may result in the insertion of a new provision in that act. [28]

65. If it is accepted that the interpretation of the notion of 'modifications to the agreement' within the meaning of Article 218(7) TFEU should not be limited to its procedural dimension alone and that, from a more substantive point of view, that notion should also encompass a situation where provisions of an agreement are deprived of legal effect in the case of the application of the authorisation conferred on the Commission, Article 3(1) of Decision 2015/2169 may then be considered to authorise that institution to approve on the Union's behalf 'modifications to the agreement' within the meaning of Article 218(7) TFEU.

66. As regards, second, the question whether the Agreement with the Republic of Korea provides that modifications thereto must be adopted by a simplified procedure or by a body set up by the agreement, the second scenario should be ruled out a priori in so far as the only task entrusted to the Committee on Cultural Cooperation under Article 5(8)(a) of the Protocol on Cultural Cooperation is that it should 'upon advice from the Domestic Advisory Groups, six months before the expiry [of the period of three years], … coordinate in order to assess the results of the

22 See, inter alia, judgment of 17 March 2016, *Parliament* v *Commission* (C-286/14, EU:C:2016:183, paragraph 54).

23 See Communication from the Commission to the European Parliament and the Council of 9 December 2009 – Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM(2009) 673 final), paragraph 3.2, p. 5.

24 See, inter alia, judgment of 17 March 2016, *Parliament* v *Commission* (C-286/14, EU:C:2016:183, paragraph 30 and the case-law cited).

25 See, inter alia, judgment of 17 March 2016, *Parliament* v *Commission* (C-286/14, EU:C:2016:183, paragraph 32).

26 See, inter alia, judgment of 17 March 2016, *Parliament* v *Commission* (C-286/14, EU:C:2016:183, paragraph 42).

27 See, inter alia, judgment of 16 July 2015, *Commission* v *Parliament and Council* (C-88/14, EU:C:2015:499, paragraph 44).

28 See, inter alia, judgment of 16 July 2015, *Commission* v *Parliament and Council* (C-88/14, EU:C:2015:499, paragraph 43).

implementation of the entitlement in terms of enhancement of cultural diversity and mutually beneficial cooperation on co-produced works'. That Committee is not therefore responsible for modifying the agreement with regard to the entitlement at issue. That being said, the intervention of the Committee six months before the expiry of each period of three years illustrates the fact that, although the automatic renewal of the entitlement is the rule under Article 5(8)(b) of the Protocol, that rule does not, contrary to the assertion made by the Commission, prevent that provision being considered as establishing a procedural step with a view to the renewal or withdrawal of the entitlement.

67. In addition, it seems possible for the Agreement with the Republic of Korea to be considered to provide for a simplified procedure, as is required by Article 218(7) TFEU, for the withdrawal of the entitlement at issue in so far as it is sufficient that a Party terminates it by giving notice at least three months before the expiry of the initial or any subsequent period. Furthermore, if it were to be considered, on a particularly broad interpretation, that the renewal of the entitlement constitutes a modification to that agreement, which I do not think is the case, there is no doubt that the automatic character of that renewal, which as such does not require any action on the part of the Parties, would allow it to be classified as a 'simplified procedure' within the meaning of Article 218(7) TFEU.

68. As regards, third, the question whether approval from the Council to renew the entitlement at issue can be regarded as a specific condition attached to the authorisation conferred on the Commission by Article 3(1) of Decision 2015/2169, this seems to be the case, as the withdrawal of the entitlement can be prevented only if the Council, on a proposal from the Commission, decides by unanimity to renew that entitlement for a further period of three years. In other words, the authorisation that is conferred on the Commission in order to bring about the termination of the entitlement at issue can be applied only if that institution does not decide to initiate the special procedure on the basis of which the Council may adopt a decision to extend the entitlement.

69. However, I consider that, in making the renewal of the entitlement at issue subject to such a special procedure, characterised by a vote by unanimity in the Council, Article 3(1) of Decision 2015/2169 is not consistent with Article 218(7) TFEU.

70. I note that recital 6 of that decision states that the continuation of the entitlement at issue must be approved by the Council pursuant to a specific procedure necessitated both by the sensitive nature of this element of the Agreement with the Republic of Korea and by the fact that the agreement is to be concluded by the Union and its Member States.

71. Although I can imagine that the renewal of the entitlement at issue for a period of three years could, from the point of view of the European Union, give rise to a decision by the Council before the expiry of each period, I find it difficult to understand why the voting rule required for the adoption of that decision should be different from the rule that was applied for the adoption by the Council of the decision to conclude the Agreement with the Republic of Korea, that is to say, a qualified majority. In so far as the entitlement at issue and the principle that it is renewed automatically every three years were subject to the consent of the Union by a decision adopted by a qualified majority, I consider that, drawing a parallel, the Union's internal reiteration of its commitment should also be the subject of a decision adopted by a qualified majority.

72. I note in this regard that there is nothing in the wording of Article 218(7) TFEU to suggest that the voting rule applicable to decisions relating to the authorisation procedure laid down in that provision, including the formulation of the specific conditions attached to the authorisation in question, should depart from the qualified majority voting rule that constitutes the principle within the framework of Article 218 TFEU. [29]

73. The Court's case-law on another simplified procedure, the procedure under Article 218(9) TFEU, seems to run along similar lines.

74. That provision lays down a simplified procedure for the purpose, in particular, of deciding on the positions to be adopted on behalf of the European Union in the context of its participation in the adoption, within a decision-making body set up by the international agreement concerned, of acts applying or implementing that agreement. [30] According to the Court, in so far as Article 218(9) TFEU does not lay down 'any voting rule for the purpose of adoption by the Council of the categories of decisions which it covers, the applicable voting rule must be determined in each individual case by reference to Article 218(8) TFEU'. [31] Consequently, it must be held that 'as a general rule, the Council acts by a qualified majority and that it is only in the situations set out [in the second subparagraph of that provision] that it acts by unanimity. In those circumstances, the applicable voting rule must, in each individual case, be determined according to whether or not it falls within one of those situations'. [32] In order to determine, in that context, whether a decision adopted within the framework of Article 218(9) TFEU does cover a field for which unanimity is required, it is necessary to refer to its substantive legal basis. [33]

75. In my view, the reasoning developed by Court in relation to the simplified procedure provided for in Article 218(9) TFEU should be applied by analogy to the simplified procedure provided for in Article 218(7) TFEU.

76. It follows that, in so far as the contested decision does not cover a field for which unanimity is required, [34] the applicable voting rule was laid down in the first subparagraph of Article 218(8) TFEU namely a qualified majority.

77. Furthermore, the argument that the special procedure characterised by a unanimous vote in the Council is justified both by the sensitive nature of the renewal of the entitlement at issue and by the fact that the Agreement with the Republic of Korea is to be concluded by the Union and its Member States should, in my view, be rejected. The Court has already acknowledged that 'where it is apparent that the subject matter of an agreement falls partly within the competence of the European Union and partly within that of the Member States, it is essential to ensure close

[29] As Advocate General Mengozzi stated in his Opinion in *Commission* v *Council* (C-28/12, EU:C:2015:43, point 89), 'the procedural framework for the negotiation and conclusion of the EU's international agreements was established by the Treaty of Lisbon which, among others, introduced the qualified majority rule as a general rule. The Member States approved and ratified that treaty, and are bound by it. They cannot escape it or disregard the rules which they themselves have laid down'.

[30] See judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraph 28).

[31] Judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraph 29).

[32] Judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraph 29).

[33] See judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraph 31 and the case-law cited). In its judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:662, paragraph 30), the Court stressed the need to 'preserve symmetry between procedures relating to internal activity of the European Union and procedures relating to its external activity, in compliance with the institutional balance established by the framers of the Treaties'.

[34] In this regard, the substantive legal basis to be taken into consideration appears to be Article 167(3) TFEU, which is mentioned in Decision 2015/2169. Under that provision, 'the Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe'.

cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into'.[35] However, the Court ruled that 'that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU'.[36]

78. I would add that, as the Court has already ruled, 'nor can the adoption of secondary legal bases be justified on the basis of considerations relating to the politically sensitive nature of the issue concerned or to a concern to ensure the effectiveness of a Community action'.[37]

79. Lastly, the argument that, because the contested decision was adopted by the Council using the unanimity rule, it would have been adopted a fortiori by a qualified majority if that voting rule had been in force, with the result that the decision should not be annulled on that ground, should be rejected. This argument is based on the idea that a decision adopted by unanimity necessarily meets the requirement of a qualified majority. However, I think that this reasoning is flawed because the unanimity voting rule could not be applied as it could result in the non-adoption of the Council decision authorising the renewal of the entitlement at issue. In my view, it follows that the contested decision should be annulled solely on the ground that it was adopted using a voting rule that is contrary to Article 218 TFEU.[38]

80. It follows from all of the foregoing considerations that, by providing that, for the purposes of the adoption of a decision on the extension of the period of entitlement, the Council is to act by unanimity, Article 3(1) of Decision 2015/2169 unlawfully lays down detailed rules for the adoption of measures, such as the contested decision, that are more stringent in comparison with the procedure that should be applied for that purpose under Article 218 TFEU.[39]

81. It follows, in my view, that the plea in law raised by the Commission is well founded and that the contested decision must therefore be annulled.

B. Maintenance of the effects of the contested decision

82. The Council requests the Court, should it annul the contested decision, to maintain its effects until the grounds for annulment have been remedied.

83. The second paragraph of Article 264 TFEU provides that the Court may, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

[35] See, inter alia, judgment of 28 April 2015, *Commission* v *Council* (C-28/12, EU:C:2015:282, paragraph 54 and the case-law cited).

[36] Judgment of 28 April 2015, *Commission* v *Council* (C-28/12, EU:C:2015:282, paragraph 55).

[37] Judgment of 6 May 2008, *Parliament* v *Council* (C-133/06, EU:C:2008:257, paragraph 59).

[38] See Opinion of Advocate General Mengozzi in *Commission* v *Council* (C-28/12, EU:C:2015:43), in which he did not think that the argument that the voting rule laid down in Article 218 TFEU was not infringed because unanimity always includes a qualified majority could succeed. Referring to the observations already made by Advocate General Sharpston, Advocate General Mengozzi pointed out that 'a decision to which no one is opposed is not necessarily the same as a decision on which a qualified majority can agree, in so far as the content of a decision which can command a qualified majority might need to be watered down in order to be approved unanimously or without any opposition' (point 81). See, in the same vein, Opinion of Advocate General Sharpston in *Commission* v *Council* (C-114/12, EU:C:2014:224, point 189).

[39] See, for similar reasoning, judgment of 22 September 2016, *Parliament* v *Council* (C-14/15 and C-116/15, EU:C:2016:715, paragraph 72).

84. In that regard, it is apparent from the case-law of the Court that, on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the parties concerned. [40]

85. In the present case, the annulment of the contested decision without its effects being maintained would be liable to cast doubt on the commitment of the European Union in relation to the extension of the period of entitlement for a duration of three years, from 1 July 2020 to 30 June 2023, and thus to hinder the proper implementation of the Agreement with the Republic of Korea. [41]

86. Consequently, in my view, the effects of the contested decision should be maintained, for reasons of legal certainty, if, as I propose, the annulment of that decision were to be ordered by the Court.

VI. Costs

87. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs.

88. Under Article 140(1) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The French Republic and the Kingdom of the Netherlands should therefore be ordered to bear their own costs.

VII. Conclusion

89. In the light of all the foregoing considerations, I propose that the Court should:

1. annul Council Decision (EU) 2020/470 of 25 March 2020 as regards the extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part;

2. maintain the effects of Decision 2020/470;

3. order the Council of the European Union to pay the costs, and

4. order the French Republic and the Kingdom of the Netherlands to bear their own costs.

[40] See, inter alia, judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraph 62 and the case-law cited).

[41] See, by analogy, judgment of 2 September 2021, *Commission* v *Council* (Agreement with Armenia) (C-180/20, EU:C:2021:658, paragraph 63 and the case-law cited).